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No. 08-1165

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

MARK LEVY,
Petitioner,
v.

STERLING HOLDING COMPANY, LLC;
NATIONAL SEMICONDUCTOR CORPORATION;
AND
FAIRCHILD SEMICONDUCTOR
INTERNATIONAL, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS (NCPERS) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBERT D. KLAUSNER
KLAUSNER & KAUFMAN, P.A.
10059 N.W. First Court
Plantation, Florida 33324
(954) 916-1202

April 20, 2009

QUESTIONS PRESENTED

1. Whether the rule against retroactive agency rulemaking of *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), and the principles of retroactivity analysis of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), are categorically inapplicable to amended agency rules that purport to clarify agency rules but that conflict with courts of appeals' prior interpretations of those rules.

2. Whether the Securities and Exchange Commission's new Rule 16b-3, 17 C.F.R. §240.16b-3(2005) – which exempts from disgorgement those short-swing profits realized from an insider's acquisition of securities from the insider's own company – is a lawful interpretation of Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78p(b), which provides for a broad, prophylactic right to recover profits acquired by an insider as a result of short-swing transactions in the insider's company securities.

SUPREME COURT RULE 29.6
CORPORATE DISCLOSURE STATEMENT

The National Conference on Public Employee Retirement Systems pursuant to Supreme Court Rule 29.6 files this "Corporate Disclosure Statement" and shows that it has no parent company and no publicly held company owns 10% or more of its stock.

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INTEREST OF THE *AMICUS CURIAE* [1]

The National Conference on Public Employee Retirement Systems (hereinafter NCPERS) is a national organization focused on the preservation, growth and stability of public pension plans and funds. The decision of the Third Circuit Court of Appeals in *Levy v. Sterling Holding Company, LLC*, 544 F.3d 493 (3rd Cir. 2008), undermines and frustrates these goals.

The National Conference on Public Employee Retirement Systems is the largest national non-profit public pension advocacy organization, representing over 500 governmental pension funds having assets in excess of $2 trillion. NCPERS was founded in 1941 to protect the pensions of public employees by representing public pension organizations on Capitol Hill, providing trustee education and providing essential pension information to trustees, administrators and public officials.[2]

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[1] As required by Supreme Court Rule 37.6, counsel certifies that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amicus*, its members or undersigned counsel made a monetary contribution to the preparation or submission of this brief. Counsel for *amicus* also represents that counsel of record for all parties received notice of *amicus*'s intention to file this brief at least 10 days prior to the due date and that all parties have consented to the filing of this brief. Letters reflecting the parties' consent have been filed with the Clerk.

[2] General information concerning NCPERS as well as specific data regarding its activities can be found at its website: www.ncpers.org.

The *amicus* and its member funds representing significant assets and millions of citizens have an interest in this matter and will be adversely affected by the decision rendered by the Third Circuit in this case. The Third Circuit's determination weakens the protections adopted by Congress for the protection of shareholders. As the largest holders of publicly traded capital in the United States, public pension plans are particularly sensitive to any action which undermines the security of those investments. A threat to the security of those investments arises when officers and directors are permitted to engage in short-swing speculation in the securities of their companies as those transactions allow insiders to profit from and are rife with speculative abuse and insider misconduct to the detriment of other shareholders, as Congress correctly determined when it enacted Section 16(b) of the Securities Exchange Act as a prophylactic measure against such abuses. The underlying assets of public pension funds invested in the public equity markets support the state constitutionally guaranteed benefits payable to millions of American public employees and retirees, and these assets as well as the fairness and honesty of the equity markets in which they are invested are placed at grave risk when officers and directors are permitted to engage in short-swing speculation in the securities of their companies. As a consequence of the Third Circuit's determination, public pension funds are being deprived of a very effective statutory mechanism that Congress set in place to protect them as investors and the securities markets in which they invest from the unfair use of inside information by corporate insiders, insider security price manipulation, insider manipulation of

corporate affairs and sudden and unreasonable fluctuations in security prices resulting from such wrongful conduct.

SUMMARY OF ARGUMENT

The issues presented in this case merit review in this Court as the decision will have potentially widespread adverse fiscal implications for public pension funds at a time when these funds are threatened by the worst capital markets since the Great Depression.

Nearly 70% of the money which will ultimately be paid to public employee retirees is derived from earnings on assets invested in the capital markets. The decision below will permit corporate officers and directors to place their interests above those of the shareholders and place them in a position to enrich themselves through short-swing profits, while weakening the financial security of the pension funds.

ARGUMENT

THE DECISION OF THE THIRD CIRCUIT WILL LEAD TO INSTABILITY IN THE MANAGEMENT AND PROTECTION OF PUBLIC EMPLOYEE RETIREMENT FUNDS TO THE DETRIMENT OF THE MEMBERS AND BENEFICIARIES OF THOSE FUNDS AND THE GOVERNMENTAL ENTITIES WHICH SPONSOR THEM.

There are more than 20 million working and retired state and local government employees in the United States. Retired public employees live in virtually every city and town in the nation (90% retire and remain in the same jurisdiction where they worked). Active public employees comprise more than 10% of the nation's workforce and two-thirds are employed in education, public safety, corrections and the judiciary. Retention of experienced and trained personnel in these positions is critical to the continuous and reliable delivery of public services.[3]

As of 2006, state and local retirement plans served close to 26 million Americans, including 14.5 million active participants, 4 million inactive members and 7.3 million retirees and other beneficiaries receiving regular payments. Total benefit payments in 2006 were $151.7 billion, for an average benefit payment of $1,739.00 per month or

[3] Data and statistics obtained are generally available through the NCPERS website: www.ncpers.org. *See also* the website of the National Association of State Retirement Administrators, www.nasra.org.

$20,867.00 per year. Boivie and Almeida, "Pensionomics – Measuring the Economic Impact of State and Local Government Retirement Plans," National Institute on Retirement Security, February 2009; http://www.nirsonline.org/index.

In 2006, the total state and local government pension receipts were $392.8 billion, with government contributions totaling $64.5 billion, employee contributions of $32.7 billion, and earnings on investments accounting for $295.6 billion. Put differently, of the total state and local pension fund receipts in 2006, 16.4% came from employer contributions, 8.3% from employee contributions, and 75.3% from investment earnings. *Id.*; *see also* State and Local Government Employee-Retirement Systems, U.S. Census Bureau, Washington, D.C., 2007; http://www.census.gov/govs/www/retire.html.

The pattern of investments constituting the overwhelming source of pension assets has proven to be true over time. Between 1993 and 2006, 19.6% of pension receipts came from employer contributions, 10.8% from employee contributions and 69.6% from investment earnings. Earnings on investments have, therefore, historically made up the bulk of public pension fund receipts. Boivie and Almeida, *supra*, at 2.

The recent decline in the capital markets, including losses attributable to officer and director misconduct, has significantly eroded the funding status of public plans. Park, "Public Plan Asset Allocations," Employee Benefit Research Institute, Volume 30, No. 4, April 2009; http://www.ebri.org/publications.

The impact of resulting underfunding has been estimated over a 15-year horizon to be almost $2 trillion in 2005 dollars. *See* Marx and Rauh, NBER Working Paper Series, "The Intergenerational Transfer of Public Pension Promises," National Bureau of Economic Research, September 2008; www.nber.org/paper/w14343.pdf.

It is therefore abundantly clear that anything which threatens the financial security of the underlying assets of public employee retirement systems threatens the financial security of 25 million Americans. In addition, losses attributable to pension fund participation in the capital markets, particularly losses attributable to officer and director misconduct, go directly to the constitutionally guaranteed promise applicable in every state. Specific state constitutional provisions relating to retirement or impairment of contract provisions have, in all fifty states, been interpreted to assure that public pension benefits are ultimately a taxpayer guarantee. *See, e.g.*, Alaska Const. Article XII, §7; Fla. Const. Article I, §10; La. Const. Article X, §29; N.Y. Const. Article V, §7.

The decision of the Third Circuit encourages and facilitates opportunism by corporate insiders for the purpose of short-term profit at the expense and to the detriment of shareholders and the capital markets in which they trade. The legislative history of Section 16(b) clearly demonstrates that its purpose was to prevent corporate officers and other insiders from short-term speculation in their companies' securities. 78 Cong. Rec. 2270, 2271 (1934).

This Court has held "Congress intended securities legislation . . . to be construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes.'" *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972). By permitting the Securities and Exchange Commission ("SEC") rule to retroactively permit short-swing trades by insiders, the SEC has eviscerated a key Congressional protection enacted against one of the principal evils of the 1929 stock market crash which Section 16(b) was intended to remedy. Consequently, such practices will continue to plague investors, and public pension plans in particular.

In the enforcement of the nation's securities laws by investors, Congress has specifically found that large institutional investors like public pension plans are the plaintiffs most likely to achieve the best result on a just basis for the most investors. *See In re Cendant Corporation Litigation*, 264 F.3d 201 (3rd Cir. 2001); Cox and Thomas, "Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions," 106 Colum. L. Rev. 1587 (2006). As stewards of that important principle, the public pension community is deeply concerned with any weakness in the regulatory framework which threatens market integrity and fairness.

In a March 26, 2009 press statement, the U.S. Department of the Treasury stated:

> "The crisis of the past 18 months has exposed critical gaps and weaknesses in our financial regulatory system. As risks built up, internal risk management systems, rating agencies

> and regulators simply did not understand or address critical behaviors until they had resulted in catastrophic losses."

"Treasury Outlines Framework for Regulatory Reform" (March 26, 2009); http://www.treasury.gov/press/release/tg72.htm.

The decision of the Third Circuit below and the actions of the SEC only add to those regulatory failures. The security of the nation's investors, particularly in a critical time of recovery, should be strengthened, not weakened.

CONCLUSION

For the above and foregoing reasons, *amicus curiae* urges that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

ROBERT D. KLAUSNER
KLAUSNER & KAUFMAN, P.A.
10059 N.W. First Court
Plantation, Florida 33324
(954) 916-1202

Counsel of Record
for Amicus Curiae
NATIONAL CONFERENCE
ON PUBLIC EMPLOYEE
RETIREMENT SYSTEMS

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